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Supreme Court of the United States

OCTOBER TERM, 1926.

No. [redacted] 159

THE GOODYEAR TIRE & RUBBER COMPANY, INC., PETITIONER,

vs.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONER, THE GOODYEAR TIRE & RUBBER COMPANY.

SPENCER GORDON,
DEAN ACHESON.
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1926.

No. 816

THE GOODYEAR TIRE & RUBBER COMPANY, INC., PETITIONER,

vs.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONER, THE GOODYEAR TIRE & RUBBER COMPANY.

Report of Opinion Below.

The opinion of the Court of Claims (Rec. p. 25) has not been reported.

Jurisdiction.

This is on petition for certiorari to the Court of Claims under Section 3 (b) of the Act of February 13, 1925, 43 Stat. L. 936, 939. The judgment was entered

June 14, 1926 (R. 27). A motion for new trial was filed July 16, 1926, and was overruled October 25, 1926 (R. 27). The petition for certiorari was filed January 6, 1927 (R. 28).

Statement of the Case.

The petitioner sues for unpaid rent under a lease to the United States for the use of the Veterans' Bureau at an annual rental of $44,152.58 of property in Cincinnati, Ohio.

This lease was dated in 1921 and by its terms was to continue until June 30, 1926, provided there were sufficient appropriations from year to year. Prior to June 30, 1923, representatives of the Veterans' Bureau notified the petitioner that the United States would give up occupany of the premises as of June 30, 1923.

Prior to June 30, 1923, an act had been passed providing a sufficient appropriation for such rent for the period from June 30, 1923, to June 30, 1924, 42 Stat. L. 1227, 1243. What followed is thus stated in the plaintiff's petition:

> "When June 30, 1923, arrived the officials of the Veterans' Bureau desired to occupy the premises beyond that date, and possession was continued by the United States into the following fiscal year, the officials of the Veterans' Bureau then stating that there was no intention on the part of the United States to pay rent for any longer time than the actual period of occupancy, and the officials of the claimant company stating that it was their contention that the lease extended to June 30, 1926, and that even if the original lease was not binding beyond June 30, 1923, nevertheless if the United

States remained longer than June 30, 1923, it would at least be liable for the stipulated rent for the year ending June 30, 1924, under the laws* of the State of Ohio by reason of holding over." (Rec., p. 2)

The United States continued in possession until December 20, 1923, and paid rent for the period to December 31, 1923, but has paid no rent for the period from January 1, 1924, to June 30, 1924, the remainder of the fiscal year. The petitioner was unable to rent the premises during that period.

In view of the decision in Leiter v. United States, 271 U. S. 204, the petitioner abandoned its contention that the United States was bound for the full term to June 30, 1926. The petitioner continued to assert, however, and still contends that since there was a Federal appropriation before June 30, 1923, pursuant to which the lease might have been extended to June 30, 1924, and since by the common law of Ohio, where the land was, such a holding over on June 30, 1923, would have created a tenancy to June 30, 1924, as between individuals, the United States became bound for the year by the act of holding over coupled with the authority to lease the property contained in the appropriation act.

In other words, the petitioner contends:

1. By the Appropriation Act of February 13, 1923, 42 Stat. L. 1227, 1243, appropriation had been made available for "rentals" for the Veterans' Bureau for the fiscal year ending June 30, 1924. There was therefore on June 30, 1923, authority to lease the property

*NOTE.—This refers to common law. No Ohio statute is involved as to the effect of holding over.

to June 30, 1924. This authority removed any impediment so far as R. S. Secs. 3732 and 3679* as amended were concerned, to the creation of a liability upon the United States ex contractu to pay rent if such liability would otherwise follow from acts of the proper officers of the United States.

2. Under the laws of Ohio, the affirmative act of holding over, even in spite of an express statement by the tenant that he did not intend to be bound, would create liability to pay rent just as effectively as the execution of a new lease, if the landlord treated such holding over as creating a tenancy for another year. The appropriate officer of the United States with authority to obligate the United States by reason of the Appropriation Act held over into the year for which there was an appropriation, and this act was treated by the plaintiff as creating a tenancy for another year. Under the laws of Ohio, these acts of the parties were as effective in creating a tenancy for another year as a duly executed lease would have been. There being no law of the United States to prevent, the United States was therefore bound by the one law applicable—the law of Ohio—to pay the rent for another year.

The Court of Claims, however, ignored the Ohio common law, apparently believing that the United States

*NOTE.—Section 3732 of the Revised Statutes provides, with certain exceptions not here material, that: "No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment. * * *" And Sec. 3679 of the Revised Statutes, as amended by the Act of February 27, 1906, c. 510, provides that: "No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law."

as a tenant was not subject to the ordinary rules applicable to individuals, and held that the United States was bound only for the period of actual occupancy, for which the rent already had been paid. Judgment was therefore entered for the United States.

Assignment of Errors.

1. The Court of Claims erred in not holding that when the United States had leased real estate in Ohio it was bound by the Ohio common law of landlord and tenant and thus became bound for another year by holding over, where there was statutory authority to bind the United States for such rent by reason of the fact that there was an appropriation available for the payment of the rent for the ensuing year.

2. The Court of Claims erred in not following the Ohio common law that the landlord may treat such a holding over as creating a tenancy for another year in spite of an express statement by the tenant that he does not intend to be bound.

3. The Court of Claims erred in sustaining the demurrer and in dismissing plaintiff's petition.

Argument.

Summary of Argument.

The plaintiff's contention in brief is as follows:

1. The attempted lease by the Veterans' Bureau for five years subject to appropriations each year resulted

in a lease for one year with option on the part of the United States to renew. McCollum v. United States, 17 C. Cls. 92; Smoot v. United States, 38 C. Cls. 418. Prior to June 30, 1923, the United States was therefore in possession under an existing lease.

2. As a tenant of Ohio property the United States was subject to the laws of Ohio. United States v. Bostwick, 94 U. S. 53; Clifford v. United States, 34 C. Cls. 223; Connecticut Mutual Life Insurance Company v. United States, 21 C. Cls. 195; Spoffard v. United States, 32 C. Cls. 452; Blair v. United States, 53 C. Cls. 457.

3. Under the common law of Ohio, where rent is reserved annually, and the tenant holds over and states that he does not intend to be bound for another year but the landlord states that he intends to hold the tenant for another year, the tenant is held for the entire succeeding year. Strong v. Schmidt, 8 Cir. Dec. 551, Rosenbaum v. Pendleton, 9 O. D. 642, Kerruish v. The Cleveland & Sandusky Brewing Company, 17 Ohio C. C. R. (N. S.) 449.

4. There is nothing in the United States statutes or decisions of the Federal courts which prevents this rule from applying in the present case. In order to hold the United States there need only be (1) authority to bind the United States for the ensuing year, (2) an act by the authorized officers. Leiter v. United States, 271, U. S. 204.

5. Prior to June 30, 1923, a sufficient appropriation act had been passed covering the period from June 30, 1923, to June 30, 1924, so that there was authority to bind the United States for rent, 42 Stat. L. 1227, 1243.

6. It was not necessary that the Government officials enter into an express written contract in order to bind

the United States. So long as there was an appropriation available they could bind the United States by doing the thing that the law of Ohio provided would make the tenant liable for another year, that is, by holding over. McCollum v. United States, *supra,* Smoot v. United States, *supra,* Connecticut Mutual Life Insurance Company v. United States, *supra,* Leiter v. United States, *supra.*

The Leiter Case Indicates that United States May be Bound by Holding Over.

In the case of Leiter v. United States, *supra,* there was a lease for five years subject to appropriations as in the case at bar. But in that case *there was no occupation* beyond the fiscal year ending June 30, 1922, and therefore the Government was not held for the ensuing year. The case, however, clearly indicates that had there been occupation into the next year the Government would have been bound. The opinion is in part as follows:

> "A lease to the Government for a term of years when entered into under an appropriation available for but one fiscal year is binding on the Government only for that year. McCollum v. United States, 17 C. Cls., 92, 104; Smoot v. United States, 38 C. Cls. 418, 427. And it is plain that to make it binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that *the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year;* thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such

appropriation for the subsequent year. This conclusion is in entire accord with Bradley v. United States, 98 U. S. 104, 114, 115. * * * "

"In the present case, in accordance with the notice of the Veterans' Bureau that it would surrender the premises on June 30, 1922, *the Government did not occupy the premises after that date.* That is, although a lump sum appropriation had meanwhile been made for the rental expenses of the Veterans' Bureau for the next fiscal year—in which no reference was made to these specific leases—*the leases were not continued under this appropriation for the next year, either by a specific agreement to that effect or by the occupation of the premises.* So the Government did not become liable for the payment of rent after the surrender of the premises." (Italics ours.) (p. 207, 208.)

It is clear that the Leiter case has a vital difference from the case at bar in that in the case at bar the premises were occupied into another year, whereas in the Leiter case there was no occupation into another year. And it is by reason of this holding over that the claimant contends that the United States became bound in the case at bar. Applying the rule as laid down in the Leiter case to the case at bar we find the following:

The Leiter case states that there must be two elements in order to hold the Government:

1. An appropriation available for the payment of the rent. That existed in the present case. By the Appropriation Act of February 13, 1923, 42 Stat. L 1227, 1243, appropriation had been been made available for "rentals and alterations" for the Veterans' Bureau for the fiscal year ending June 30, 1924.

2. The Government by its duly authorized officers must affirmatively continue the lease for such subse-

quent year. This "affirmative" continuation was done by the holding over into the next fiscal year. The Leiter case does not say that the "affirmative continuation" must be by a written contract. On the contrary the Leiter case calls particular attention to the fact that the premises were not occupied and that "the leases were not continued under this appropriation for the next year either by specific agreement to that effect *or by the occupation of the premises.*" The fair inference from this language is that had there been occupation it would have been considered as an affirmative continuation of the lease if the laws of the state where the property was located so provided.

Earlier Decisions of the Court of Claims Hold That United States May be Bound by Holding Over.

The foregoing view of the Leiter case is supported by the earlier decisions of the Court of Claims on this question.

In McCollum v. U. S., 17 C. Cls. 92, that Court in the following language stated that the United States might become bound to pay rent for another year by staying in possession after the expiration of its lease:

> "So far, therefore, as the contract relates to that fiscal year it was lawfully made and was binding on the defendants. Beyond that its only force was to give the Postmaster General each fiscal year thereafter, when a new appropriation should be made, the option to adopt and ratify the contract for another year. This he might do by express notice to that effect, or by entry and occupation of the premises after the commencement of the

year. *If he should occupy the premises after the beginning of the new year, he might be held to have renewed the obligation on the part of the defendants for that one year.*" (Italics ours.) (p. 104.)

The case of Smoot v. United States, 38 C. Cls. 418, is a direct authority for the proposition that a lease may be "affirmatively continued" for another year by the United States as lessee simply by virtue of the fact that the United States remains in possession of the premises into the next fiscal year. There an attempt was made to create a lease for five years when there was an appropriation only for one year. The court held the effect of the lease, plus occupation thereunder, created a tenancy to the end of the first fiscal year, with an option in the United States to renew for each succeeding year in the event that there was an adequate appropriation. *The United States remained in possession up to and after the end of the third fiscal year, and vacated the premises in the middle of the fourth fiscal year just as in the case at bar.* The Court of Claims held that by remaining in possession into the fourth fiscal year the United States became liable for rent to the end of that fiscal year, although it only occupied the premises half of the year, *and the plaintiff was given a judgment for the rent for the remainder of the year, including the part thereof that the building was not occupied.**

The case of Connecticut Mutual Life Insurance Company v. United States, 21 C. Cls. 195, is another case in which the United States was held liable as a

*NOTE.—It was held that the use of one room by a deputy marshal into the *next* year might have been for his personal purposes and was not an authorized occupancy by the United States, and there being no other occupancy the United States was not held for rent beyond the current fiscal year.

tenant for another year's rent because the United States remained in possession of the premises after the expiration of its lease. There the lease expired June 30, 1878, the end of the fiscal year. The United States, however, remained in possession until January, 1879. The court held that by so doing it became liable for rent to the end of the fiscal year ending June 30, 1879, although the tenant had occupied only for part of the fiscal year. The court clearly recognized that there might be a tenancy created under the State law without an express agreement, saying:

> "*From this state of facts springs* the relation of landlord and tenant under a lease from year to year." (p. 199)

The foregoing cases demonstrate that a situation may be created by agents of the United States holding into part of another fiscal year whereby the United States becomes bound for rent for that entire fiscal year. In other words, *the holding into the next year* may be the "affirmative act" referred to in the Leiter case, which in addition to an appropriation is all that is necessary to bind the United States.

Law of Ohio Should Be Applied.

This Court in the case of United States v. Bostwick, 94 U. S. 53, involving a question of landlord and tenant law, said:

> "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the

same circumstances will be implied against them." (p. 66)

In Clifford v. United States, 34 C. Cls. 223, the Court of Claims held:

> "* * * When it (the United States) goes into State territory to acquire an estate or right in or to real property by purchase, the law of the State controls and regulates the rights and liabilities of the contracting parties." (p. 232)

This was a case involving the New York law. The Court of Claims implied an agreement on the part of the United States because under the decisions of the courts of the State of New York *where the property was located,* such an agreement had been implied on the part of an individual holding under a similar tenancy.

In Connecticut Mutual Life v. United States, 21 C. Cls. 195, heretofore discussed, the Court was most careful to apply the Illinois law, citing Illinois statutes and cases (page 199). To the same effect as applying the local law are Spoffard v. United States, 32 C. Cls. 452, 457, and Blair v. United States, 53 C. Cls. 457.

In the Absence of Any Agreement, the Ohio Law Created a Tenancy for Another Year from the Fact of Holding Over.

The general rule as to the effect of holding over after the termination of a lease is stated in the leading case of Baltimore & Ohio Railroad Co. v. West, 57 Ohio State 161, where the Court said:

> "By holding over after the expiration of the term into the next year and paying the rent at

> the same rate for a part of that year, the plaintiff in error became a tenant for that year upon the terms of the former occupancy, and was not relieved from its obligation to pay the rent for the balance of the year by the abandonment of the premises * * *" (p. 167).

In Rosenbaum v. Pendleton, 9 O. D. 642, it was contended that the general rule as above stated did not apply when, by express declaration, the tenant repudiated the terms of the former lease.* The Court rejected this contention, saying:

> "The language of the Supreme Court (in Baltimore & Ohio Railroad Company v. West) is 'the agreement arises by implication of law from the conduct of the parties.' It is the contention of the plaintiff in error that such an implication cannot arise, or if it does is rebutted by the express declaration of the tenant that he refuses to be bound to the payment of the rent in the amount of the old terms. We are of opinion that this cannot be so; that the *implication arising from the tenant's act must obtain and cannot be rebutted or overthrown by words expressed inconsistent with the legal implication arising from the act.*"

The Court then gave the quotation below** from Strong v. Schmidt, 8 Cir. Dec. 551, and continued:

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*An express agreement between the landlord and tenant that the continuation in possession will be for a term other than from year to year will, of course, be recognized.

**"The rule of law is,—it is said that the presumption of law is, that he holds under the former contract from year to year. The language is varied by different courts in delivering the opinions. By some it is said to be a presumption, by some it is said to be an implied contract, and by some, it is said to be a constructive contract, but no matter what it is called the law clearly is that where the party has continued in possession after the termination of a year's lease, and the landlord has accepted rent from him, that the lease holds for another year, and that the same is binding and obligatory upon both parties as it would be if re-executed." Strong v. Schmidt, 8 Cir. Dec. 551, 554.

"The case of Strong v. Schmidt, *supra*, fairly means that where there is no new expressed agreement, no matter how far the expressed views of the parties may be apart and no matter how far their minds may be from meeting, yet, in the absence of any agreement, and because of the absence of any express agreement the law will imply the agreement which arises from that which is done, it being impossible to arrive at an agreement from that which is said."

Another case holding that a tenant may not question the effect of his holding over is Kerruish v. Brewing Company, 17 Ohio C. C. R. (N. S.) 449. This was a suit to recover from the lessee annual rental for the year next succeeding the original term, because of the holding over of such lessee beyond the expiration of the original term by its sub-tenant's occupancy of a part of the premises. It was held that the non-assent of the lessee to the sub-tenant's holding over was immaterial, and that the trial court erred in refusing to grant the following charge requested by plaintiff, which correctly stated the law:

"7. *Where a tenant holds over the term of a lease, either by remaining in possession of the premises personally or through his tenants or sub-tenants, his intentions and desires as to the lease are wholly immaterial. Actions speak louder than words, and the tenant, by his very act in remaining in possession of the premises after the term, gives the landlord the choice of electing to treat him as a tenant for the new term, or as a trespasser, and the landlord has this election wholly independent of any desires, wishes, or intentions on the part of the tenant.*"

The cases discussed thus demonstrate that the Ohio law in reference to leases where rent is reserved on an annual basis is as follows:

1. Where a tenant holds over into another year he can make an express agreement with his landlord that the possession will be from month to month or for any other agreed period, and such an express agreement will be recognized.

2. If the tenant holds over without saying anything an agreement for another year will be implied.

3. If the tenant holds over and expressly states that he does not wish to become a tenant for another year but the landlord does not agree with the tenant that his tenancy will be for any period other than a year, the parties thus disagreeing as to the effect of the holding over, as in the case at bar, a tenancy for another year will be implied.

The Fact That the Original Lease Could Not Run for Five Years Owing to Lack of Attestation and Acknowledgment Required by the Ohio Laws, Has No Bearing on the Rule in Ohio Creating a Tenancy from Year to Year by Reason of Holding Over.

The original lease was perhaps not effective for its full term since it was not acknowledged or witnessed as required by the statutes of Ohio. But these statutes further provided: (Rev. Stat. Ohio, Sec. 4112.)

> "Nothing in this chapter contained shall affect the validity of any lease of school or ministerial

> lands for any term not exceeding ten years *or of any other lands for any term not exceeding three years or require such lease to be attested, acknowledged or recorded.*" (Italics ours.)

Under this statute and the decisions of the Ohio courts, where a tenant enters and pays rent under an attempted lease for five years which is ineffective because of deficient attestation or acknowledgment he becomes a tenant from year to year. And if such tenant holds over into another year he becomes a tenant for that additional year just as though his original lease had been entirely valid. Thus in Baltimore & Ohio Railroad Co. v. West, 57 Ohio State 161, the Court said:

> "In this case though the written agreement was ineffectual as a lease for the term of five years on account of the omission of the parties to acknowledge its execution and have it recorded, the plaintiff in error, by taking possession and paying the rent under the agreement, became a tenant from year to year at the annual rent fixed by it, and payable according to its terms; and, by holding over after the expiration of the term * * * became a tenant for that year upon the terms of the former occupancy * * *." (p. 167)

It is thus apparent that if the lease in the case at bar was ineffective as a lease for five years under the Ohio law, as contended by the defendant in its brief, there was nevertheless an entry by the Government which created a tenancy from year to year under the Ohio law, and since the Government held over after June 30, 1923, a tenancy was created for the year ending June 30, 1924, under the decision in Baltimore & Ohio Railroad Co. v. West, which has just been quoted.

Let us now look at the situation from another point

of view: It seems to be the contention of the defendant that the effect of the Federal statutes and court decisions was to reduce the lease to one for a year with option to renew from year to year. If this is so of course it became a lease for "a term not exceeding three years." By Section 4112 of the Revised Statutes of Ohio, which is quoted above, it did not have to be attested, acknowledged or recorded. The occupancy by the United States for the period from 1921 to June, 1923, was therefore under a lease valid by the laws of Ohio and there is again no reason why all the Ohio decisions as to holding over should not be applicable.

The Lease Did Not Give the United States the Right to Terminate the Tenancy at Will.

There is a remaining point which was not mentioned in the opinion of the Court of Claims, but which was raised by Government counsel in the Court below. They called attention to paragraph 5 of the lease (R. p. 21) which provided:

> "That for and in consideration of the faithful performance of the conditions and stipulations of this agreement, the lessee shall pay to the lessor the sum or sums specified in Condition '1' (a) and (b) hereof, and such other sums for which the lessee may become liable under the provisions of Conditions '2' and '9'; payment to be made at the end of each calendar month, or as soon as practicable thereafter. Should the premises be relinquished before the close of any monthly period, the rental for the last period shall be only the pro rata part of the monthly rental."

The argument was made that the last sentence of this paragraph gave the United States the right to terminate the tenancy at any time and that no rent was due beyond the period of actual occupancy.

However, the plain intention and meaning of Paragraph 5 will not support such an argument. At common law in the absence of any covenant or agreement for apportionment of rent in respect to time it is not apportionable. 16 Ruling Case Law 937. If a tenancy is terminated between the rent days and if the rent does not become due until after the termination it never becomes due.

In the lease in the case at bar the rent was payable "in equal monthly installments in arrears." (Rec. 19) and was to be paid "at the end of each calendar month or as soon as practicable thereafter." (Rec. p. 21.) If therefore the tenancy was terminated before the end of the month—for example, by failure of the landlord's title, constructive eviction, destruction of the property by fire (as contemplated in paragraph 10 of the lease), or other recognized causes for terminating a lease—there would not, in the absence of any agreement, be any liability on the part of the tenant to pay rent for that portion of the month during which he had occupied the premises because the rent would not have become due at the date of termination. The parties therefore inserted the sentence prorating the rent in the paragraph relating solely to payment of rent.

In view of the very clear provision of Paragraph 1 (a), (b), and (c), as to the duration of the lease, a right to cancel at any time at lessee's option cannot be implied from the unambiguous provisions of Paragraph 5, relating only to payment of rent.

"The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended." Sheets v. Seldon, 7 Wallace 416, 423.

Conclusion.

It is therefore urged that the Court of Claims erred in dismissing the plaintiff's petition, and that the writ of certiorari should issue.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 159.

THE GOODYEAR TIRE & RUBBER COMPANY, INC., PETITIONER,

vs.

THE UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONER, THE GOODYEAR TIRE & RUBBER COMPANY, INC.

Report of Opinion Below.

The opinion of the Court of Claims (Rec. p. 25) is reported in 62 C. Cls. 370.

Jurisdiction

This case is on certiorari to the Court of Claims under Section 3 (b) of the Act of February 13, 1925,

43 Stat. L. 936, 939. The judgment of the Court of Claims was entered June 14, 1926, sustaining a demurrer and dismissing the petition (R. 27). A motion for new trial was filed July 16, 1926, and was overruled October 25, 1926 (R. 27). The petition for certiorari was filed in this Court January 6, 1927 (R. 28), and the writ was granted April 11, 1927.

Statement of the Case.

This case involves a claim for unpaid rent from January 1, 1924, to June 30, 1924, amounting to $19,173.60 net after certain allowances to the United States. The Court of Claims sustained a demurrer to the petition which set forth the following facts:

The Goodyear Tire & Rubber Company, an Ohio corporation, by lease of October 13, 1921, leased to the United States for the use of the Bureau of War Risk Insurance

> "* * * the following described premises, to have and to hold the same with their appurtenances unto the lessee under the conditions named below, viz:
>
> "(a) The entire first (1st), second (2nd) and third (3rd) floors, * * * in the building located at No. 415 East Sixth Street, in the City of Cincinnati, * * * Ohio. The rent to be paid for the term beginning with date of occupancy and ending June 30, 1926, shall be at the rate of $33,412.83 per annum, payable in equal monthly installments in arrears.
>
> "(b) The entire fourth (4th) floor, * * * in the building located at No. 415 East Sixth Street, in the City of Cincinnati, * * * Ohio. The rent

to be paid for the term beginning April 1, 1922, and ending June 30, 1926, shall be at the rate of $10,739.75 per annum, payabe in equal monthly installments in arrears.

"(c) That it is mutually understood and agreed that in the event an appropriation is not made from which rent hereunder for any succeeding fiscal year may be paid, this agreement shall automatically terminate as of June 30th of the fiscal year for which an appropriation is last available, and in such event both parties hereto shall be relieved from obligation hereunder in like manner as if the term of occupancy had run its full period." (R. 19.)

The Veterans Bureau on behalf of the United States took possession of the first, second and third floors of the demised premises October 1, 1921, and took possession of the fourth floor June 1, 1922. They occupied the premises continuously down to December 20, 1923, on which date they vacated the same. (R. 8.)

January 9, 1922, the Goodyear Tire & Rubber Company, the Ohio corporation, subsequent to a reorganization thereof assigned, transferred and set over the lease in question to the Goodyear Tire & Rubber Company, Inc., a Delaware corporation, and the plaintiff in this case.* (R. 8.)

May 1, 1922, a letter was addressed by the Acting Director of the United States Veterans Bureau to the plaintiff, the Goodyear Tire & Rubber Company, Inc.,

*Note: No contention has been made that this violated R. S. 3737 prohibiting the assignment of a contract, and it does not appear that such is the case. See Freedman's Savings & Trust Company v. Shepherd, 127 U. S. 494, Musselman v. United States, 52 C. Cls. 436, holding leases not within section, and Seaboard Air Line v. United States, 256 U. S. 655, indicating reorganization not within companion statute R. S. 3477. See also Empire Refining Co. v. Davis, 6 Fed. (2nd) 305.

and an acknowledgment of the same was made as follows:

"May 1, 1922.

"The Goodyear Tire and Rubber Company, Inc.,
East Market Street, Akron, Ohio.

"Gentlemen: In view of the decision of the Attorney General relating to contracts based on annual appropriations, it is considered necessary to give notice that the United States does hereby renew a certain lease dated August 23, 1921, by and between the United States and the Goodyear Tire and Rubber Company, Incorporated, covering premises described as the entire first, second, third and fourth floors, containing a total area of approximately 46,476 square feet of floor space in the building located at No. 415 East Sixth Street, Cincinnati, Ohio, for the fiscal year beginning July 1, 1922, and ending June 30, 1923.

"Respectfully, (Sgd.) L. B. Rogers. L. B. Rogers,
Acting Director, U. S. Veterans' Bureau.

Receipt of the above notice is acknowledged and assent is hereby given to the renewal of said lease.

"The Goodyear Tire & Rubber Company, Inc.,
Lessor, by G. M. Stadelman, Vice-President.

"Attest: Chas. A. Stillman, Secretary. (Seal of the Goodyear Tire & Rubber Company, Inc.)
"August 15th, 1922." (R. 9.)

The rent for the demised premises was duly paid by the United States down to June 30, 1923. Prior to that date officials of the United States Veterans Bureau notified the plaintiff that the United States would give up occupancy of the demised premises as of June 30, 1923. (R. 9.)

February 13, 1923, a statute had been enacted providing a sufficient appropriation for such rent for the period from June 30, 1923, to June 30, 1924, 42 Stat. L. 1227, 1243.* What followed is thus stated in the plaintiff's petition:

> "When June 30, 1923, arrived the officials of the Veterans' Bureau desired to occupy the premises beyond that date, and possession was continued by the United States into the following fiscal year, the officials of the Veterans' Bureau then stating that there was no intention on the part of the United States to pay rent for any longer time than the actual period of occupancy, and the officials of the claimant company stating that it was their contention that the lease extended to June 30, 1926, and that even if the original lease was not binding beyond June 30, 1923, nevertheless if the United States remained longer than June 30, 1923, it would at least be liable for the stipulated rent for the year ending June 30, 1924, under the laws* of the State of Ohio by reason of holding over." (R. 10.)

The United States continued in possession until December 20, 1923, and paid rent for the period to December 31, 1923, but has paid no rent for the period from January 1, 1924, to June 30, 1924, the remainder of the fiscal year. The plaintiff made vigorous efforts to rent the premises during that period, but was unable to do so. Allowance is made in the claim, however, for certain building services which the claimant was saved by the non-occupancy. (R. 11.)

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*Note: There had in fact been annual appropriations for the preceding years for which rent had been paid: For the fiscal year ending June 30, 1922, Act of March 4, 1921, 41 Stat. L. 1367, and Act of August 9, 1921, 42 Stat. L. 147. For the fiscal year ending June 30, 1923, Act of June 12, 1922, 42 Stat. L. 635.

*Note: This refers to the decisions. No Ohio statute is directly involved as to the effect of holding over.

In view of the decision in *Leiter v. United States,* 271 U. S. 204, the petitioner abandoned its contention, originally asserted in the Court of Claims, that the United States was bound for the full term to June 30, 1926. The petitioner continued to assert, however, and still contends that since there was a Federal appropriation before June 30, 1923, pursuant to which the lease might have been extended to June 30, 1924, and since by the common law of Ohio, where the land was, such a holding over on June 30, 1923, would have created a tenancy to June 30, 1924, as between individuals, the United States became bound for the year by the act of holding over coupled with the authority to lease the property contained in the appropriation act.

In other words, the petitioner contends:

1. By the Appropriation Act of February 13, 1923, 42 Stat. L. 1227, 1243, appropriation had been made available for "rentals" for the Veterans' Bureau for the fiscal year ending June 30, 1924. There was therefore on June 30, 1923, authority to lease the property to June 30, 1924. This authority removed any impediment so far as R. S. Secs. 3732 and 3679* as amended were concerned, to the creation of a liability upon the United States *ex contractu* to pay rent if such liability would otherwise follow from acts of the proper officers of the United States.

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*Note: Section 3732 of the Revised Statutes provides, with certain exceptions not here material, that: "No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment. * * *" And Sec. 3679 of the Revised Statutes, as amended by the Act of February 27, 1906, c. 510, provides that: "No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law."

2. Under the law of Ohio applicable to the present case the affirmative act of holding over continued the lease for a year, even in spite of the statement by the tenant that it intended to be bound only for a shorter period. The officials of the Veterans' Bureau with authority to obligate the United States by reason of the Appropriation Act, held over into the year for which there was an appropriation, and this act was treated by the plaintiff as creating a tenancy for another year. Under the law of Ohio, these acts of the parties were as effective in creating a tenancy for another year as a duly executed lease would have been. There being no law of the United States to prevent, the United States was therefore bound by the one law applicable —the law of Ohio—to pay the rents for another year.

The Court of Claims, however, ignored the Ohio common law, apparently believing that the United States as a tenant was not subject to the ordinary rules applicable to individuals, and held that the United States was bound only for the period of actual occupancy, for which the rent already had been paid. Judgment was therefore entered for the United States.

Assignment of Errors.

1. The Court of Claims erred in not holding that when the United States had leased real estate in Ohio it was bound by the Ohio common law of landlord and tenant and thus became bound for another year by holding over, where there was statutory authority to bind the United States for such rent by reason of the fact that there was an appropriation available for the payment of the rent for the ensuing year.

2. The Court of Claims erred in not following the Ohio common law that the landlord may treat such a holding over as creating a tenancy for another year in spite of an express statement by the tenant that he does not intend to be bound.

3. The Court of Claims erred in sustaining the demurrer and in dismissing plaintiff's petition.

Argument.

Summary of Argument.

The plaintiff's contention in brief is as follows:

1. The attempted lease by the Veterans' Bureau for five years subject to appropriations each year resulted in a lease for one year with option on the part of the United States to renew. Prior to June 30, 1923, the United States was therefore in possession under an existing lease.

2. As a tenant of Ohio property the United States was subject to the laws of Ohio.

3. Under the common law of Ohio, where rent is reserved annually, and the tenant holds over and states that he intends to be bound for less than a year, but the landlord states that he intends to hold the tenant for another year, the tenant is held for the entire succeeding year.

4. There is nothing in the United States statutes or decisions of the Federal courts which prevents this rule from applying in the present case. In order to hold the United States there need only be (1) author-

ity to bind the United States for the ensuing year, (2) an act by the authorized officers.

5. Prior to June 30, 1923, a sufficient appropriation act had been passed covering the period from June 30, 1923, to June 30, 1924, so that there was authority to bind the United States for rent.

6. It was not necessary that the Government officials enter into an express written contract in order to bind the United States. So long as there was an appropriation available they could bind the United States by doing the thing that the law of Ohio provided would make the tenant liable for another year, that is, by holding over.

7. The Court of Claims has jurisdiction under Section 145 of the Judicial Code.

The Leiter Case Indicates that United States May be Bound by Holding Over.

In the case of *Leiter v. United States*, 271 U. S. 204, there was a lease for five years subject to appropriations as in the case at bar. But in that case *there was no occupation* beyond the fiscal year ending June 30, 1922, and therefore the Government was not held for the ensuing year. The case, however, clearly indicates that had there been occupation into the next year the Government would have been bound. The opinion is in part as follows:

> "A lease to the Government for a term of years when entered into under an appropriation available for but one fiscal year is binding on the Government only for that year. McCollum v. United States, 17 C. Cls., 92, 104; Smoot v. United States,

38 C. Cls. 418, 427. And it is plain that to make it binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that *the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year;* thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such appropriation for the subsequent year. This conclusion is in entire accord with Bradley v. United States, 98 U. S. 104, 114, 115. * * *"

"In the present case, in accordance with the notice of the Veterans' Bureau that it would surrender the premises on June 30, 1922, *the Government did not occupy the premises after that date.* That is, although a lump sum appropriation had meanwhile been made for the rental expenses of the Veterans' Bureau for the next fiscal year—in which no reference was made to these specific leases—*the leases were not continued under this appropriation for the next year, either by a specific agreement to that effect or by the occupation of the premises.* So the Government did not become liable for the payment of rent after the surrender of the premises." (Italics ours.) p. 207, 208.)

It is clear that the Leiter case has a vital difference from the case at bar in that in the case at bar the premises were occupied into another year, whereas in the Leiter case there was no occupation into another year. And it is by reason of this holding over that the claimant contends that the United States became bound in the case at bar. Applying the rule as laid down in the Leiter case to the case at bar we find the following:

The Leiter case states that there must be two elements in order to hold the Government:

1. An appropriation available for the payment of the rent. That existed in the present case. By the

Appropriation Act of February 13, 1923, 42 Stat. L. 1227, 1243, appropriation had been made available for "rentals" for the Veterans' Bureau for the fiscal year ending June 30, 1924.*

2. The Government by its duly authorized officers must affirmatively continue the lease for such subsequent year. This "affirmative" continuation was done by the holding over into the next fiscal year. The Leiter case does not say that the "affirmative continuation" must be by a written contract. On the contrary the Leiter case calls particular attention to the fact that the premises were not occupied and that "the leases were not continued under this appropriation for the next year either by specific agreement to that effect *or by the occupation of the premises.*" The fair inference from this language is that had there been occupation it would have been considered as an affirmative continuation of the lease if the laws of the state where the property was located so provided.

Earlier Decisions of the Court of Claims Hold That United States May be Bound by Holding Over.

The foregoing view of the Leiter case is supported by the earlier decisions of the Court of Claims on this question.

Note: "That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Executive office and sundry independent executive bureaus, boards, commissions, and offices, for the fiscal year ending June 30, 1924, namely: * * *

United States Veterans Bureau.

For carrying out the provisions of an Act entitled 'An Act to establish a Veterans Bureau and to improve the facilities and service of such bureau and to further amend and modify the War Risk Insurance Act approved August 9, 1921,' including salaries and expenses of the central office at Washington, District of Columbia, and regional offices and sub-offices, and including * * * rentals * * * $49,984,063."

In *McCollum v. United States,* 17 C. Cls. 92, that Court in the following language stated that the United States might become bound to pay rent for another year by staying in possession after the expiration of its lease:

> "So far, therefore, as the contract relates to that fiscal year it was lawfully made and was binding on the defendants. Beyond that its only force was to give the Postmaster General each fiscal year thereafter, when a new appropriation should be made, the option to adopt and ratify the contract for another year. This he might do by express notice to that effect, or by entry and occupation of the premises after the commencement of the year. *If he should occupy the premises after the beginning of the new year, he might be held to have renewed the obligation on the part of the defendants for that one year."* (Italics ours.) (p. 104.)

The case of *Smoot v. United States,* 38 C. Cls. 418, is a direct authority for the proposition that a lease may be "affirmatively continued" for another year by the United States as lessee simply by virtue of the fact that the United States remains in possession of the premises into the next fiscal year. There an attempt was made to create a lease for five years when there was an appropriation only for one year. The court held the effect of the lease, plus occupation thereunder, created a tenancy to the end of the first fiscal year, with an option in the United States to renew for each succeeding year in the event that there was an adequate appropriation. *The United States remained in possession up to and after the end of the third fiscal year, and vacated the premises in the middle of the fourth fiscal year just as in the case at bar.* The Court

of Claims held that by remaining in possession into the fourth fiscal year the United States became liable for rent to the end of that fiscal year, although it only occupied the premises half of the year, *and the plaintiff was given a judgment for the rent for the remainder of the year, including the part thereof that the building was not occupied.**

The case of *Connecticut Mutual Life Insurance Company v. United States*, 21 C. Cls. 195, is another case in which the United States was held liable as a tenant for another year's rent because the United States remained in possession of the premises after the expiration of its lease. There the lease expired June 30, 1878, the end of the fiscal year. The United States, however, remained in possession until January, 1879. The court held that by so doing it became liable for rent to the end of the fiscal year ending June 30, 1879, although the tenant had occupied only for part of the fiscal year. The court clearly recognized that there might be a tenancy created under the State law without an express agreement, saying:

> "*From this state of facts springs* the relation of landlord and tenant under a lease from year to year." (p. 199)

The foregoing cases demonstrate, as indicated by the Leiter case, that no express written renewal of a lease is necessary, but that a situation may be created by agents of the United States holding into part of another fiscal year whereby the United States becomes bound for rent for that entire fiscal year. In other

*Note: It was held that the use of one room by a deputy marshal into the *next* year might have been for his personal purposes and was not an authorized occupancy by the United States, and there being no other occupancy the United States was not held for rent beyond the current fiscal year.

words, *the holding into the next year* may be the "affirmative act" referred to in the Leiter case, which in addition to an appropriation is all that is necessary to bind the United States.

Law of Ohio Should Be Applied.

This Court in the case of *United States v. Bostwick*, 94 U. S. 53, involving a question of landlord and tenant law, said:

> "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them." (p. 66)

In *Clifford v. United States*, 34 C. Cls. 223, the Court of Claims held:

> "* * * When it (the United States) goes into State territory to acquire an estate or right in or to real property by purchase, the law of the State controls and regulates the rights and liabilities of the contracting parties." (p. 232)

This was a case involving the New York law. The Court of Claims held the United States because under the decisions of the courts of the State of New York *where the property was located*, an individual would have been held in a similar case.

In *Connecticut Mutual Life v. United States*, 21 C. Cls. 195, heretofore discussed, the Court was most careful to apply the Illinois law, citing Illinois statutes and cases (page 199). To the same effect as applying

the local law are *Spoffard v. United States,* 32 C. Cls. 452, 457, and *Blair v. United States,* 53 C. Cls. 457.

Under the Ohio Law a Tenancy for Another Year was Created from the Fact of Holding Over.

In the petitioner's brief accompanying its petition for certiorari the construction of the lease and the decisions of Ohio applicable to the holding over were fully discussed. (See prior brief, pages 14 to 19.) In the brief for the Government in opposition, however, appears the following statement at page 8:

> "Assuming that the case is to be governed by the law of Ohio and that the United States is in the same position as a private corporation would be under like circumstances, we would have no ground to contend that by holding over after the expiration of the one year term ending June 30, 1923, the United States did not by virtue of the election of the landlord become obligated for a term of one year ending June 30, 1923. * * *"

In view of this admission we shall not repeat the argument on this point contained in the prior brief.

The Court of Claims had Jurisdiction.

In its brief in opposition to the petition for certiorari the Government raised a question regarding the jurisdiction of the Court of Claims, contending that the obligation of the United States did not arise from a con-

tract express or implied in fact and was not enforceable in the Court of Claims.*

The jurisdictional statute is as follows:

> "Judicial Code: Sec. 145. (*Jurisdiction.*) The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> "First. (*Claims against the United States.*) All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable * * *."

Of this statute it was said in *United States v. Emery, Bird, Thayer Realty Company*, 237 U. S. 28, 32, that it was an

> "inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye."

There can be no question that were the United States suable, they would be liable for rent for the full year July 1, 1923, to June 30, 1924. The Government did not deny this.

It is also true that the Court of Claims has exercised unquestioned jurisdiction for more than forty-five

*Note: The Court of Claims did not give this as a reason for its decision.

years to enter judgments for rent against the United States under tenancies originally created by express leases and continued by holding over in possession of premises into a new period.

Such a judgment was entered in *Connecticut Mutual Life Insurance Co. v. United States*, 21 C. Cls. 195. In that case, as in this the United States remained in possession of the premises. The Court of Claims said:

> "From this state of facts springs the relation of landlord and tenant under a lease from year to year."

See also *McCollum v. United States*, 17 C. Cls. 92; *Smoot v. United States*, 38 C. Cls. 418. And in *Leiter v. United States*, 271 U. S. 204, this Court clearly indicated that the obligations of the United States under a lease from year to year could be continued "either by a specific agreement to that effect or by the occupation of the premises."

It is clear, then, that the fact that a tenancy has been continued by the conduct of the Government in holding over does not make an action for rent beyond the jurisdiction of the Court of Claims. Such actions are "founded" on the original lease, otherwise there would be no tenancy. But the duration of the tenancy is determined by the law. In such cases when the Government holds over it acquiesces in the continuance of the relation of landlord and tenant into which it has expressly entered. Once continued, that relationship remains in existence for the period fixed by the law of the situs. It may be a month, or it may be a year, or the landlord may terminate it at will, whatever the local law provides.

The present case is equally one "founded" upon the

original lease. The United States continued, as it had a right to do, in possession as a tenant. It sought to limit the duration of the tenancy to its own will. This, under the law, it could not do over the objection of the plaintiff. The duration of the tenancy, fixed by law, in such a case was one year unless a less period was agreed upon. None was. Therefore, the United States continued as tenant under the terms, conditions and obligations of the original lease for one year.

Hence, the present case is founded upon the original lease and within the jurisdiction of the Court of Claims.

The fact that the Government stated that it expected to incur obligation as a tenant during its own pleasure, we have already stated, had no legal effect in affecting the term of the tenancy. It may be pointed out that in the case of *Leiter v. United States*, 271 U. S. 204, the fact that the United States stated in the contract that the tenancy was to continue for five years subject to appropriations did not affect the duration. In that case no tenancy for *more* than a year with option in the United States to renew could legally be created. In the present case no tenancy for *less* than a year could legally be created over the protest of the plaintiff.

Every lease has some incidents which are determined by law but this does not prevent suit thereon against the United States. In *Bostwick v. United States*, 94 U. S. 53, suit was brought on a contract which was held equivalent to a lease. Claim was made for the destruction of trees and fences and for the digging and carrying away of stone. This was not expressly covered by the lease, and the Court said:

"The United States when they contract with their citizens are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them. * * * (66).

"* * * But the implied obligation as to the manner of the use is as much obligatory upon the United States as it would be if it had been expressed. If there is a failure to comply with the agreement in this particular, it is a breach of the contract for which the United States consent to be sued in the Court of Claims. * * * This was voluntary waste, and within the prohibition of the implied agreement in the lease. For this the Court of Claims can award compensation in this action." (69)

When the lease was first entered into between Goodyear and the United States, one of its obligations was that if the United States, having an adequate authority, held over, the lease would be continued, at the plaintiff's option, for another year. The Ohio law made that a part of the lease just as the provision against waste became a part of the lease in the Bostwick case. The obligation arose because the United States entered into the contract of lease. Therefore, this suit is "founded" upon the lease, and thus on an express contract within the jurisdictional statute.

There is, however, an entirely distinct basis for jurisdiction in the case at bar. In addition to the jurisdiction over "Claims * * * upon any contract, express or implied," the statute provides for jurisdiction over

"all claims * * * for damages, liquidated or unliquidated, in cases not sounding in tort, in respect

> of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable * * *."

This jurisdiction has been held to be distinct. *Dooley v. United States,* 182 U. S. 222, 223; *United States v. Lynah,* 188 U. S. 445, 475. The possibility that an action may be sustained *either* as an action founded upon a contract *or* as an action for damages not sounding in tort has been expressly pointed out in *Juragua Iron Company v. United States,* 212 U. S. 297, 302, where the Court said:

> "Manifestly, no action can be maintained under this statute unless the United States became bound by implied contract to compensate the plaintiff for the value of the property destroyed, or unless the case—regarding it as an action to recover damages—be one '*not* sounding in *tort*'."

Also in *United States v. Cornell Steamboat Company,* 202 U. S. 184, 190, it was held that the claim in question was not founded upon a contract, express or implied, but the Court said:

> "But the claim may properly be said to be one for unliquidated damages in a case 'not sounding in tort' in respect of which the party would be entitled to redress in a court of admiralty if the United States were suable."

Therefore even the contention of the Government that the present case is not founded upon contract, express or implied, is fruitless if the claim falls within the remaining provisions of the statute just quoted. The jurisdiction under this portion of the statute can hardly be doubted.

It has been admitted that this is a case where "the party would be entitled to redress against the United States * * * in a court of law * * * if the United States were suable." It is a claim for damages. By the express terms of the statute therefore the Court of Claims has jurisdiction unless it is a case sounding in tort.*

It is obvious that this is not a case sounding in tort. No tort or wrong has been done the plaintiff company by any Government official. The plaintiff company was willing to have the Government remain in possession into the new term. Officials of the plaintiff company contended that under their construction of the lease it ran throughout the ensuing year and in fact up to June 30, 1926, but they stated that if this construction was incorrect they would consider that the Government would be bound for the ensuing year under the Ohio law relating to holding over. The plaintiff having announced this position prior to July 1, 1923, there was no moment that the Government was tortiously remaining on the plaintiff's property. The Government was always there by permission of the plaintiff, and there is no tort in the case.

The cases cited in the Government's brief in opposition to the petition for certiorari can readily be distinguished: In two this Court expressly said that the claim sounded in tort: *Temple v. United States*, 248 U. S. 121, (claim for real estate taken in dredging operation where Government had claimed title); *Ball*

Note: The distinction between contract and tort cannot be evaded and jurisdiction obtained by framing a claim sounding in tort as upon an implied contract or upon equitable considerations. Gibbons v. United States, 8 Wall. 269, 274; Hill v. United States, 149 U. S. 593, 598; United States v. Minnesota Investment Co., 271 U. S. 212, 218.

On the other hand, jurisdiction will not be lost because a claim may be called a contract implied in law if it is not sounding in tort: Clark v. United States, 95 U. S. 539; Crocker v. United States, 240 U. S. 74; Freund v. United States, 260 U. S. 60.

Engineering Co. v. White & Co., 250 U. S. 46 (claim for equipment which Government officials took claiming right to do so under contract with a third party). In *Horstman Co. v. United States,* 257 U. S. 138, where an irrigation project had injured the claimant's property by percolating waters it was held that the Government did not "intend a taking by that which no human knowledge could even predict." In *Klebe v. United States,* 263 U. S. 188, recovery for the value of a steam shovel was denied because this Court found that it had been taken under claim of right pursuant to an express contract, so that the terms of the express contract governed, or else the claim sounded in tort.

The jurisdiction in the case at bar can therefore be sustained as upon a claim for damages not sounding in tort.

Conclusion.

In conclusion we respectfully refer again to the case with which we commenced our argument, the recent decision of this Court in *Leiter v. United States,* 271 U. S. 204, from which the inference seems to be clear that a prior appropriation plus an occupation of the premises will make the Government liable for another year, and in which no doubt of the jurisdiction is expressed.

It is therefore prayed that the decision of the Court of Claims be reversed and the case remanded with instructions to overrule the demurrer to the petition.

Respectfully submitted,

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Spencer Gordon,
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Shipman Handbook of Common Law Pleading, 2d Ed., page 9	7
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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 159.

THE GOODYEAR TIRE & RUBBER COMPANY, INC., PETITIONER,

vs.

THE UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

REPLY BRIEF FOR PETITIONER, THE GOODYEAR TIRE & RUBBER COMPANY, INC.

The Court of Claims Has Jurisdiction.

The only question raised by the United States is as to the jurisdiction of the Court.

The petitioner contends that there is jurisdiction under Section 145 of the Judicial Code, *either*

(1) As upon a claim founded upon a contract, express or implied, with the Government of the United States, *or*

(2) As upon a claim for damages in a case not sounding in tort in respect of which claim the party would be entitled to redress against the United States in a court of law if the United States were suable.

The United States contends that it is not liable upon implied contracts, except those implied in fact, and that the liability for the additional year's rent is one imposed by law. (See Government brief, page 6.)

The United States further suggests that it is not liable for penalties imposed for tortious acts, and that this is such. (Page 15.)

It is significant that the United States does not cite the jurisdictional statute. Nor does it rely upon any cases like the one at bar. It bases its argument solely on a line of cases where on the special facts recovery was not allowed on contracts implied in law.

The error in the Government's argument is the assumption that recovery is absolutely precluded if a case involves a contract implied in law even though it may be a claim for damages in a case not sounding in tort. This cannot be so because of the decisions of this court in Freund v. United States, 260 U. S. 60; *and Clark v. United States,* 95 U. S. 539; *and the dictum in Crocker v. United States* 240 U. S. 74.

In *Freund v. United States,* 260 U. S. 60, there had been an express contract to carry mail in St. Louis. The Post Office Department, relying on certain clauses in the contract, substituted another route and ordered the contractors to begin performance at what the Department held to be the same rate per mile of service. The contractors protested, but threatened with suit upon their bond, performed the service and accepted periodical payments. They then entered suit.

> "The contractors' claim was that the substitution of the new route for the one they bid on was not within the terms of the contract, but was unconscionable, and that they were entitled to recover for the work done on the new route on a *quantum meruit*." (62)

It will be observed that Government officials had expressly stated that they would pay only what the contract called for. According to the contention of the Government counsel in the case at bar, this could not have resulted in a contract implied in fact, to pay the value of the services rendered, the claim on a *quantum meruit* basis must have been on a contract implied at law, and therefore it should have been held that the Court of Claims had no jurisdiction. But this Court did *not* so hold. The Court said:

> "We think that the contractors are entitled to recover the reasonable value of their services for the sixteen months, including a fair profit."

And the case was remanded to the Court of Claims with directions to find the value of the services rendered on the substituted route including a fair profit, and to enter judgment for the balance found due.

In *Clark v. United States*, 95 U. S. 539, suit was brought on on oral contract to pay rental for a steamer at $150 per day and if she were lost to pay whatever three disinterested men should estimate her value to be. The vessel was wrecked and the three disinterested men found her value to be $60,000. She had been in the service of the Government for eight days. It was held that there could be no recovery on the contract as such because it was not in writing and that there could be no recovery for the loss of the vessel. But it was

held that the claimant could recover the value of the vessel "as upon an implied contract" for a *quantum meruit*. The rental fixed in the parole contract was taken as *evidence* of the value, and the claimant was allowed recovery at $150 per day. It will be noted that the court here allowed recovery in implied contract, and it must have been a contract implied in law and not in fact *because the amount found due was entirely different from the intention of the Government officers.* The *fact* was that the Government officials intended to pay a flat rate of $150 per day (not whatever the value of the use of the vessel was), plus the value of the vessel as found by three disinterested men if the vessel were lost. The Government officials did *not* intend to pay the value of the use of the vessel (whatever it might turn out to be) without any payment for its loss. There were no facts on which such an agreement could be found and they had expressly agreed to pay on a different basis. The court clearly found a contract implied at law when recovery for the value of the use of the vessel was allowed in *quantum meruit.*

The *Clark* case was followed in *Crocker v. United States,* 240 U. S. 74, where it was stated that although there could be no recovery on an express contract for the sale of satchels to the Post Office Department because it was tainted with fraud and had been rescinded by the Postmaster General on that ground, there might have been a recovery upon a *quantum valebat* for the satchels actually furnished had evidence been introduced of their value. This would evidently have been a contract implied in law, for it would have been on a basis different from the express intentions of the Government officials.

It is clear from these three cases that the mere fact

that the Government officials stated in the case at bar that they would not be bound for a year would not prevent liability from arising by their act of holding over, and it is further evident that this court has given judgments in cases where it could be said that the obligation of the United States was implied in law rather than in fact.

Analysis of the cases cited on page 8 of the Government's brief as authorities for the contention that there is no jurisdiction if a contract implied in law is involved will show that in each case recovery was allowed on the facts or there was some good reason why the claim could not be allowed as an action in damages not sounding in tort:

Case was sounding in tort: *Temple v. United States,* 248 U. S. 121; *Ball Engineering Co. v. White,* 250 U. S. 46; *Horstman Co. v. United States,* 257 U. S. 138; *United States v. Minnesota Co.,* 271 U. S. 212 (claimant also failed to show United States under any obligation to pay interest); *Livingston v. United States,* 273 U. S. 648.

No authority in officials to bind United States: *Sutton v. United States,* 256 U. S. 575; *Baltimore & Ohio v. United States,* 261 U. S. 592.

Express contract precluded recovery: *Klebe v. United States,* 263 U. S. 188.

No showing repayment not compelled by Government under Section 1 of Dent Act: *Merritt v. United States,* 267 U. S. 338.

Recovery allowed on facts: *United States v. Buffalo Pitts Company,* 234 U. S. 228; *United States v. North American Transportation & Trading Co.,* 253 U. S. 330.

Probably the strongest case from the standpoint of the Government is *United States v. Minnesota Investment Co.*, 271 U. S. 212. In that case recovery was sought on equitable considerations because interest on a fund deposited in court by the claimant had been paid to the United States by the bank where it had been placed. But in that case if the claimant was to recover it must have been on the theory of a constructive trust, and in such cases where a trustee diverts funds, the *cestui* may, when the claim arises, elect to treat him either as a debtor or a trespasser, 39 Cyc. 533. The case therefore "sounded in tort."

From the *Freund, Clark*, and *Crocker* cases and from the cases cited by the Government, we believe that the true rule is that the fact that a claim may have aspects of a contract implied in law will not preclude recovery if it is a claim under the last branch of Section 145 of the Judicial Code, for damages in a case not sounding in tort in respect of which the party would be entitled to redress against the United States in a court of law if the United States were suable.*

It remains to determine whether this is a case "sounding in tort."

The Government does not argue this point at length but cites a New York case (page 15), which states that the right to hold the tenant is the penalty imposed by law upon the trespassing tenant. The Government's brief then says, "Of course the United States is not liable for penalties imposed for tortious acts."

In the case cited, *U. M. Realty & Imp. Co. v. Roth*, 193 N. Y. 570, there was a *silent* holding over. To

*This is all in addition to the argument contained on pages 16 to 19 of the petitioner's original brief that this is essentially a suit "founded upon" an express contract, to wit, the lease.

call this "sounding in tort" would appear to be inconsistent with the many cases where the Court of Claims has held the United States on silent holdings over (see petitioner's original brief, pages 11 to 14), for if those cases had been "sounding in tort" they would have been dismissed according to the Government's theory.

In the case at bar no actual tort was involved (see petitioner's original brief, page 21). The action would have been in debt or in *indebitatus assumpsit* (see Tiffany, Landlord and Tenant, Vol. II, pp. 1818, 1824), neither of which are now considered tort actions, Shipman, Handbook on Common Law Pleading, 2d Ed., p. 9.

The Government does not appear to deny this, but contends that the *historical basis* of the liability is in tort. This, however, clearly is not the meaning of the statute. If the words "sounding in tort" precluded recovery in all cases where the liability was historically originally based on tort, no recovery would have been allowed in the *Freund, Clark and Crocker* cases heretofore discussed in this reply brief, since, though not founded upon contracts express or implied in fact, they were essentially assumpsit actions which *historically* were torts, although not in any sense torts at the present time or at the time of the passage of the Tucker Act of 1887. (See Shipman, Handbook of Common Law Pleading, 2d Ed., p. 9.)

From the decisions in these cases it appears that the words "sounding in tort" refer not to the ancient historical basis of the action but to the sort of action that would have been brought against an individual at the time of the passage of the Tucker Act. In the case at bar, as has been pointed out, the action would

not have been in tort but would have been in debt or assumpsit.

It is the claimant's contention that if a tort action could have been brought against an individual, recovery cannot be had by framing the case in implied contract, but if no tort action could have been brought (whatever the ancient history of the liability may be) there may be recovery where recovery could have been had against an individual.

As a matter of fact it is very doubtful whether it is correct to say that the historical basis of the liability is tortious in the case at bar. In Blackstone's Commentaries, Book 2, p. 150, occurs the following:

> "An estate at *sufferance* is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As if a man takes a lease for a year, and after a year is expired continues to hold the premises without any fresh leave from the owner of the estate. * * * This estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant: for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger: and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful; unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful."

And Tiedeman in Real Property, 2 ed. 189 says,

> "The tenant, however, is not a trespasser unless he attempts to retain possession after entry by the owner."

There was no entry in the present case, so that, even historically considered, the holding over never became tortious.

It is therefore urged that the Court had jurisdiction, and it is prayed that the decision of the Court of Claims be reversed and the case remanded with instructions to overrule the demurrer to the petition.

Respectfully submitted,

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